

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-644

LEE KLINGER VOLKSWAGEN, INC.,

Petitioner,

vs.

CHRYSLER CORPORATION, CHRYSLER MOTORS CORPORATION, CHRYSLER CREDIT CORPORATION, CHRYSLER REALTY CORPORATION AND EVANSTON DODGE, INC.,

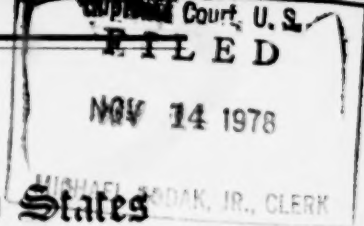
Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.**

EDWARD L. FOOTE,
EDWARD J. WENDROW,
One First National Plaza,
Chicago, Illinois 60603,
(312) 786-5600,

HIRA D. ANDERSON, JR.,
Office of the General Attorney
Chrysler Corporation,
P. O. Box 1919,
Detroit, Michigan 48288,
Attorneys for Respondents.

WINSTON & STRAWN,
One First National Plaza,
Chicago, Illinois 60603,
Of Counsel.



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MAY IT PLEASE THE COURT:

QUESTIONS PRESENTED.

1. Whether the absorption of losses by a manufacturer of the operations of a marketing subsidiary constitutes a violation of Section 1 of the Sherman Act, of which a competitor of the subsidiary can complain, where no predatory intent or conspiracy is claimed, and the complaining competitor has made substantial profits while competing against the subsidiary.

2. Whether petitioner's claim under Section 1 of the Sherman Act is legally sufficient after it has conceded that respond-

ent's "Dealer Enterprise" plan does not constitute a *per se* violation of the Sherman Act and it has put in no evidence relating to geographic or product market, or effect on competition in the market.

STATEMENT.

The facts are accurately stated in the Court of Appeals opinion. We believe, however, that a brief recapitulation would be helpful to demonstrate that this case presents no question of general importance that merits further review by this Court.

Petitioner's basic claim is that respondent Chrysler,* merely by absorbing the losses of a marketing subsidiary that competed with petitioner, and which had been organized by respondent pursuant to its "Dealer Enterprise" (DE) plan, thereby violated section 1 of the Sherman Act.

In about 1954 Chrysler initiated its DE plan which was modified in certain respects in 1961. Under this plan Chrysler organizes a dealership corporation and initially owns all of its preferred voting and non-voting common stock. It seeks out an investor, who invests in the common stock. If the investor is successful, Chrysler's preferred stock is bought out from the profits of the dealership. Chrysler has no desire to be in the retail business. The DE plan is a method by which a person can become an independent owner of his own business.

One of these DE outlets, of the about 240 (Tr. 127) in the United States, in addition to 5200 private capital dealers (Tr. 26), was "Evanston Dodge." It was originally established in an undesirable location in Evanston, a suburb of Chicago (Tr. 17, 18, 27). A few years later it moved into a newly-built facility located in "automobile row," a few miles away from petitioner's location in Chicago. Between 1963 and 1972 it lost in the neigh-

* The various Chrysler name subsidiaries can be disregarded since no evidence was introduced against them relating to matters of which petitioner complains.

borhood of \$750,000, for various business reasons shown in the record. It is unnecessary to go into them because counsel conceded the losses were not incurred pursuant to a scheme to drive petitioner out of business.

Petitioner was 100% owned by Lee Klinger (Tr. 412) Since he could allocate profits between earnings and his salary as he saw fit, his profits and salary for the ten years he was in competition with Evanston Dodge are set forth below:

Year	Net Profit	Klinger's Salary	Total
1963	\$ 8,596	\$20,689	\$29,285
1964	8,239	15,692	23,692
1965	14,523	20,650	35,173
1966	11,603	18,817	30,420
1967	6,320	22,652	28,972**
1968	14,876	36,131	51,007
1969	1,881	26,083	27,964
1970	18,731	36,083	84,814
1971 (1st 6 Mo.)*	44,526	12,916	57,442

(Pretrial order)

Klinger's profits and salary for 1971, the year in which he terminated himself, projected, would have given him total earnings of about \$115,000. Average salary and profits increased despite the closer proximity of Evanston Dodge. In the face of these facts counsel ask the Court to grant certiorari on the grounds that Evanston Dodge's competition put it out of business (pp. 2, 4, 5).

In February, 1970, or earlier, Klinger got in touch with Volkswagen, which predicted that if he became a dealer he would make a 40% return on an investment of \$287,290 (Tr. 518, 519). He invested \$275,000 from his basic net worth

* We take only the first six months of 1971 because, in June-August, Klinger was liquidating and selling at a smaller profit (Tr. 448).

** This is the year that Evanston Dodge moved closer to petitioner's dealership.

of \$348,000 that he amassed while a Dodge dealer (Tr. 520, 521). Klinger lost \$130,000 during the first year because of market and tariff changes; hence this lawsuit (Tr. 515).

Klinger was succeeded by a DE investor which bought Chrysler out in 1973 (Tr. 117). Thus, except for a short hiatus, one private capital operator replaced another. Evanston Dodge closed its doors in January, 1972 (Tr. 116).

Petitioner's counsel introduced no evidence relating to geographic or product market, respondents' share of the market, or the effect of the operation of the DE plan on competition. Indeed, in the District Court he made the assertion that he had never heard "that position taken in a Section 1 case" (Tr. 624).

Finally, although petitioner claims he made a jury issue under Section 1, he does not even claim the existence of a conspiracy between Chrysler and some other legal entity. (See Questions Presented for Review.)

REASONS FOR DENYING THE PETITION.

1.

The Petition Should Be Denied, Because It Presents No Questions of Law Worthy of the Certiorari Jurisdiction of This Court.

It is obvious, from a mere reading of the petition and Court of Appeals decision, that this case presents no question of general importance under the Sherman Act. Possibly important general questions are expressly disclaimed because the petition expressly states, "Plaintiff did not challenge the legality of dual distribution or Chrysler's Dealer Enterprise plan itself" (p. 4).

Consequently, petitioner is in the position of asking this Court to take this case and decide whether under the unique facts of this record a jury issue under the Sherman Act was made out. But "[Certiorari] jurisdiction was not conferred upon this Court merely to give the defeated party in the circuit court

of appeals another hearing" (*Magnum Import Co. v. Coty*, 262 U. S. 159, 163, "or for the benefit of the particular litigants" (*Rice v. Sioux City Cemetery*, 349 U. S. 70, 74), but to decide the issues, "the settlement of which is of importance to the public as distinguished from that of the parties" (*Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387, 393).

2.

The Petition Should Be Denied Also Because the Decision of the Court of Appeals Is Correct and Is Not in Conflict with the Decision of Any Other Court of Appeals.

The decision of the Court of Appeals was plainly correct, for a number of reasons.

Petitioner conceded that respondent's conduct was not a *per se* violation of § 1 (A6, A8). Therefore, the claimed restraint of trade must be tested under the "rule of reason" as articulated by this Court in such cases as *Chicago Board of Trade v. United States*, 246 U. S. 231, 238 (1917), and *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U. S. 36 (1977). Under the rule of reason test the relevant product and geographic market must be determined. After this has been done "the courts examine the condition of the market both before and after the imposition of the restraint to gauge whether the restraint is reasonable." *Antitrust Laws and Trade Regulation*, von Kalinowski, Vol. 1, § 6.02[1], pp. 6-77 (1978).^{*} No evidence was introduced that could be tested under the "rule of reason." Petitioner proved merely that Evanston Dodge lost money until it went out of business in 1972 and that Chrysler bore the operating losses.

Again, no conspiracy is asserted or proven, either in this court or the lower courts (Pretrial Order; Exhibit B). It is elementary that, in order to sustain a § 1 claim, the plaintiff

^{*} Petitioner's reliance on *per se* cases such as *Klors* (p. 7) is misplaced.

must establish both a conspiracy, combination or contract, and that such conspiracy, combination or contract, if not a *per se* violation, was an unreasonable restraint of trade.

Petitioner asserts that the Court of Appeals "holding" that petitioner must prove that defendants specifically intended to injure petitioner or drive it out of business conflicts with this Court's decision in *United States v. U. S. Gypsum Co.*, U. S., 1978-1 Trade Cases ¶ 62,103 (1978).

Evanston Dodge, with the exception of the last year (see A4), sold its new cars at prices that averaged lower than petitioner's (PX 32). The Court, after reciting this fact, merely observed that, since petitioner conceded that respondents had no intent to injure petitioner, "Thus we are not concerned with predatory price-cutting for the purpose of eliminating competition" (A6). It did not hold that a predatory intent has to be proven before liability can be found in a Sherman Act civil action. Its holding is best expressed in the last sentence of the opinion where it said that a jury verdict "that the low-priced sales by Evanston Dodge, agreed to and made possible by Chrysler, had such a destructive effect on competition in the relevant Dodge market that it was an unreasonable restraint of trade, could not stand" (A9). In other words, Chrysler's conduct was not unreasonable when tested by the "rule of reason."

Petitioner also contends that the holding of the Court is in conflict with decisions of the Third and Ninth Circuits. In fact, however, it is in accord with them.

The Ninth Circuit, in *England v. Chrysler Corp.*, 493 F. 2d 269 (C. A. 9, 1974), *cert. den.* 419 U. S. 869, held for Chrysler as a matter of law where the plaintiff was complaining of the loss operations of a DE store. The Third Circuit did likewise in *Glauser Dodge Co. v. Chrysler Corporation*, 570 F. 2d 72 (C. A. 3, 1977), which, for all practical purposes, overruled *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338 (C. A. 3, 1975) by limiting it to its particular facts. *Elfman Motors, Inc. v. Chrysler Corporation*, 1977-2 Trade

Cases, ¶ 61,650 (D. C. Pa., 1977) reached the same result as *Glauser* and was affirmed without opinion by the Third Circuit in 578 F. 2d 1373 (1978).

The claimed conflict is nonexistent and the Seventh Circuit relies on these decisions (excepting *Elfman*) in reaching its conclusion (A6, A7).

In conclusion, what petitioner is really complaining about is competition, which the antitrust laws are intended to foster. It probably would have sold more cars and been able to charge higher prices without the competition from Evanston Dodge, but an ability to exact more from buyers, because of absence of competition, is not an antitrust injury. A plaintiff "must prove *antitrust* injury, which is to say, injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489 (1977).

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD L. FOOTE,
EDWARD J. WENDROW,
One First National Plaza,
Chicago, Illinois 60603,
(312) 786-5600,

HIRA D. ANDERSON, JR.,
Office of the General Attorney
Chrysler Corporation,
P. O. Box 1919,
Detroit, Michigan 48288,
Attorneys for Respondents.

WINSTON & STRAWN,
One First National Plaza,
Chicago, Illinois 60603,
Of Counsel.